

The Administrative Law Judge (ALJ) found the claimant sustained his burden of proof regarding his need for additional left hip medical treatment but further determined

claimant failed to meet his burden of proof that his current low back condition was caused by his 1994 accidental injury.

The claimant requests review of his entitlement to medical treatment for his low back condition. Claimant argues his current low back condition is the natural and probable result of his original injury on January 20, 1994.

Respondent argues the ALJ's Award Post Award Medical should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

On January 20, 1994, the claimant was installing new propane lines in a house when he stepped on cardboard placed over a hole and fell eight feet to the basement floor. The claimant landed on his left hip and suffered a fracture and dislocation of his right hip. Although claimant also complained of back pain the primary focus of medical treatment was directed to the hip injury. Ultimately, claimant had a total right hip replacement performed by Dr. Joseph W. Huston. Dr. Huston also examined claimant's back but neither requested diagnostic studies nor offered treatment recommendations. In November 1995, Dr. Huston provided a rating for only the claimant's hip as a result of the January 20, 1994 accident.

In December 1995 claimant saw Dr. Huston and reported low back complaints but Dr. Huston did not believe claimant had significant pathology in his low back. After that visit the claimant did not seek further treatment with Dr. Huston for a two-year period.

On December 17, 1997, the claimant saw Dr. Huston due to low back complaints. At that time it was suggested claimant try an orthotic for his shoe. After that an approximate 5-year period elapsed during which claimant neither sought nor received any medical treatment.

In January 1999, the claimant began working full-time for UCB/Innovia Films. The claimant operated a slitting machine. Claimant's job duties included lifting film rolls that weighed approximately 80 pounds 10-15 times a day as well as standing on concrete and watching the machine 12 hours a day.

On September 20, 2002, claimant returned to Dr. Huston with left low back, hip and thigh pain. Claimant told the doctor that a year before he had fallen off a horse, injured some ribs and was unsure if he'd injured his hip and back. Claimant also described the strenuous nature of his job at UCB. The doctor was unsure whether the claimant's symptoms were from his back, hip or both. But the doctor agreed that claimant's work

activities at UCB were aggravating his low back. Claimant was provided medicine, therapy and last seen by the doctor on October 30, 2002.

When claimant returned to Dr. Huston on February 4, 2003, claimant's complaints included pain radiating into the left lower extremity. The doctor noted that he could not say for sure that claimant's lower back symptoms were due to the 1994 accidental injury.¹

After diagnostic testing revealed a L5-S1 disk protrusion, Dr. Huston reviewed his medical records and noted claimant had at various times during treatment over the years complained of low back pain and accordingly concluded claimant's current condition, as likely as not, could have started in January 1994.

Claimant received three steroid injections. The first one was in August 2003, the second one was either September or October 2003, and the last one was January 2005. Claimant testified he received some relief from the injections in 2003 but no relief from the 2005 injection.

Claimant suffered a hairline heel fracture when he fell off a ladder at work in June 2004. The claimant was treated at the emergency room and then received follow-up with Dr. John H. Gilbert. Claimant returned to Dr. Huston with low back complaints on November 5, 2004, and told the doctor that he believed his low back complaints were more than likely aggravated by the fall off the ladder.

Claimant testified he has been having problems with his left hip and pain in his back and left leg since the date of the accident. He further testified that sitting for long periods of time has exacerbated his symptoms in his hip and low back. Claimant opined his current back problems are related to his 1994 injury.

Dr. Huston concluded claimant's low back pain and disk problems were more likely than not related to the accidental injury in 1994. But the doctor agreed that claimant's intervening work activities at UCB aggravated that condition. The doctor testified:

Q. And, you do agree that that type of work activity, standing all day or 12 hours a day, four days a week and lifting 75 to 80 pounds could certainly be an aggravating factor?

A. It can, yes.

Q. You had a follow-up on September 24th, 2002, after you had some x-rays taken, correct?

A. Yes.

¹ Huston Depo., Ex. 3.

Q. You noted at that time that it was difficult to tell whether all of his symptoms were coming from his back, his left hip or both: is that correct?

A. Yes.

Q. He again - - you again documented that he had to stand 12 hours in his ordinary shift and that he developed quite a lot of pain at the end of those shifts, correct?

A. Yes.

Q. Would that statement to you from Mr. Hermann support the conclusion that his work activity was aggravating his low back and/or hip?

A. I think that was obvious.²

Moreover, Dr. Huston agreed that claimant's symptoms were more severe in 2003 and his work activities at UCB were an aggravating factor. The doctor testified:

Q. So, we have a rather - - we have a change in the severity of his symptoms in '03 that cause you to investigate this situation, do additional diagnostic studies and, then, proceed forward with some epidural steroids, correct?

A. That's right.

Q. And, you would agree, would you not, Dr. Huston, that it's more likely than not that Mr. Hermann's work activities at UCB, which required extended standing, lifting 75 to 80 pounds, which he reported caused him significant pain, aggravated his condition in '03, resulting in the need for additional diagnostic studies and treatment?

A. I'm sure his work activities were an aggravating factor, yes.³

At the request of claimant's attorney, Dr. Dick Geis examined claimant on October 20, 2005. Dr. Geis concluded that claimant's low back problems started at the time of the hip injury. The doctor further concluded that it was more significant that after the injury the claimant walked with a limp and consequently the claimant's current back condition was a natural and probable consequence of the 1994 accident. But when Dr. Geis was questioned regarding the claimant's medical records he agreed that in his analysis he overlooked significant factors such as the fact that claimant consistently complained about the effect his work at UCB had on his back condition as well as the fact that Dr. Huston noted on various office visits that claimant was not limping. Moreover, the doctor

² *Id.* at 34.

³ *Id.* at 43.

was unaware that claimant had fallen from a ladder and he agreed that could be a significant factor in the determination of the causation for the claimant's back condition. Finally, Dr. Geis agreed that claimant's work activities at UCB could certainly be a significant aggravating factor for his low back symptomatology.

At respondent's request, Dr. John H. Gilbert examined claimant on July 25, 2005. Dr. Gilbert had previously treated claimant for the injury to his heel as a result of the fall from the ladder in 2004. The doctor opined that claimant's current back complaints were the result of degenerative disk disease which was aggravated by the January 20, 1994 accident but which was further aggravated by claimant's subsequent strenuous, work activities.

At the request of respondent's attorney, the claimant was examined by Dr. Michael Poppa on January 19, 2006. Dr. Poppa was provided claimant's medical records as well as the post award hearing transcript and Dr. Huston's evidentiary deposition. Dr. Poppa opined that claimant's current need for additional treatment for his low back is neither causally nor directly related to the January 20, 1994 accident and instead is due to intervening causes. The doctor concluded claimant's work activities at UCB as well as falling off a horse and a ladder were the intervening incidents which led to his current back problems.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award.

The controlling issue is whether claimant's present need for medical treatment for his low back complaints is directly and naturally related to the January 20, 1994 accident.

Every direct and natural consequence that flows from a compensable injury, including a new and distinct injury, is also compensable under the Workers Compensation Act. In *Jackson*⁴, the Court held:

When a primary injury under the Workmen's Compensation Act is shown to have arisen out of the course of employment every natural consequence that flows from the injury, including a new and distinct injury, is compensable if it is a direct and natural result of a primary injury. (Syllabus 1.)

But the *Jackson* rule does not apply to new and separate accidental injuries. In *Stockman*, the Court attempted to clarify the rule:

⁴ *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

The rule in *Jackson* is limited to the results of one accidental injury. The rule was not intended to apply to a new and separate accidental injury such as occurred in the instant case. The rule in *Jackson* would apply to a situation where a claimant's disability gradually increased from a primary accidental injury, but not when the increased disability resulted from a new and separate accident.⁵

In general, the question of whether the worsening of claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether claimant's subsequent work activities aggravated, accelerated or intensified the underlying disease or affliction.⁶

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In *Stockman*, claimant suffered a compensable back injury while at work. The day after being released to return to work, the claimant injured his back while moving a tire at home. The *Stockman* court found this to be a new and separate accident.

In *Gillig*⁸, the claimant injured his knee in January 1973. There was no dispute that the original injury was compensable under the Workers Compensation Act. In March 1975, while working on his farm, the claimant twisted his knee as he stepped down from a tractor. Later, while watching television, the claimant's knee locked up on him. He underwent an additional surgery. The district court in *Gillig* found that the original injury was responsible for the surgery in 1975. This holding was upheld by the Kansas Supreme Court.

In *Graber*⁹, the Kansas Court of Appeals was asked to reconcile *Gillig* and *Stockman*. It did so by noting that *Gillig* involved a torn knee cartilage which had never properly healed. *Stockman*, on the other hand, involved a distinct reinjury of a back sprain that had subsided.

⁵ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁶ *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

⁷ *Stockman v. Goodyear Tire & Rubber Co.*, 211 Kan. 260, 263, 505 P.2d 697 (1973).

⁸ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

⁹ *Graber v. Crossroads Cooperative Ass'n*, 7 Kan. App. 2d 726, 648 P.2d 265, *rev. denied* 231 Kan. 800 (1982).

The court, in *Graber*, found that its claimant had suffered a new injury, which was “a distinct trauma-inducing event out of the ordinary pattern of life and not a mere aggravation of a weakened back.”

In *Logsdon*¹⁰ the Kansas Court of Appeals reviewed the foregoing cases and noted a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury.

Claimant argues that his low back condition has never fully healed and has bothered him since the original injury in 1994. The Board disagrees. In the first couple of years after the 1994 injury the claimant frequently complained of low back pain and his treating physician, Dr. Huston examined him and initially concluded the fall might have irritated his sciatic nerve. Examination did not elicit indication of lumbar impingement. After an approximate two-year period claimant returned to Dr. Huston and it appears an orthotic device was placed in claimant’s shoe. A five-year period followed where claimant agreed he neither sought nor received any medical treatment.

During the five-year period when claimant received no treatment, he started the new job at UCB that required strenuous physical labor. In addition, he worked penning cattle at a livestock auction and engaged in the sport of riding a horse cutting and penning cattle. When claimant returned to Dr. Huston in 2002 with back complaints he mentioned falling from a horse the previous year as well as the physical nature of his job. And by 2003 the back complaints included radiculopathy which was a new finding and resulted in Dr. Huston ordering diagnostic tests which revealed disk problems. After the 1994 fall from the ladder at work, the claimant later went to Dr. Huston with back complaints which he attributed to the fall. Finally, Dr. Huston took claimant off work at UCB because the work was aggravating his back condition.

The ALJ analyzed the facts in the following fashion:

The Claimant has not met his burden of proof to establish that his current need of treatment for his back is related to his 1994 accident-instead, the evidence clearly shows that a preexisting condition was aggravated and accelerated by his employment at UCB. No meaningful treatment for the Claimant’s back pain was necessary until after the Claimant had been working at UCB for more than three years. In 2003 radicular symptoms appeared for the first time. Two epidural steroid injections were then provided, and the Claimant’s condition apparently stabilized until after his fall from the ladder in June 2004. This necessitated another epidural steroid injection, but as the Claimant continued to work his condition continued to deteriorate. He was finally taken off work by Dr. Huston in order that he not continue to injure his back by continuing to work.

¹⁰ *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

Dr. Huston did not adequately explain how the 1994 hip injury would cause whatever pathology it was that produced the radicular symptoms nine years later. He did concede the Claimant's employment at UCB would aggravate the Claimant's symptoms. The Court finds the opinion of Dr. Poppa to be the most well thought out and the most persuasive.¹¹

The Board agrees and affirms. The claimant had a five-year period without medical treatment for his back, moreover, in the prior years after the injury he complained of back pain but never had significant treatment with the exception of an orthotic for his shoe. The Board concludes claimant's back had healed and it was subsequent intervening incidents that led to his current low back complaints.

AWARD

WHEREFORE, it is the decision of the Board that the April 3, 2006 Post Award Medical Award of Administrative Law Judge Bryce D. Benedict is affirmed.

IT IS SO ORDERED.

Dated this _____ day of June 2006.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Jeff K. Cooper, Attorney for Claimant
Ronald J. Laskowski, Attorney for Respondent and its Insurance Carrier
Bryce D. Benedict, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director

¹¹ ALJ Award (Apr. 3, 2006) at 3-4.